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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, AS CITY MANAGER OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; R. H. CALLAND AS CITY CLERK OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; AND STANLEY J. GOLDSCHMIDT, CITY SANITARIAN OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN,

Appellees

STATEMENT AS TO JURISDICTION

MAY IT PLEASE THE COURT:

I, Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U.S.C.A. 344(a)), from a final judgment of the Supreme Court of Wisconsin entered the 9th day of June, 1947. Section 237 of the Judicial Code provides that a final judgment

or decree in a suit in the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal." The facts from which the case arises may be briefly stated as follows:

On August 29, 1946, Lawrence Dyer, the appellant, applied for a license to sell pasteurized milk in the City of Beloit, Wisconsin (R. 12). In his application he stated that he would obtain the milk from the Dean Milk Company at Chemung, Illinois (R.12-13).

Chemung, Illinois, is a distance of 25 to 30 miles from the City of Beloit (R.12).

The milk from the Dean pasteurization plant is sold in the City of Chicago, Illinois, and surrounding suburbs of Chicago, Illinois (R.14). These cities require inspection of the farms where the milk is produced, of the pasteurization plant and the facilities of transportation. The suburban cities of Chicago, Illinois, operate under what is known as the Model Milk Ordinance formulated by the Public Health Service of the United States. These regulations in regard to sanitation, quality and wholesomeness of the milk, are as stringent as the requirements of the Beloit Ordinance. In addition, the Dean Milk Company have inspectors of their own that make periodical inspections of the farms where the milk is produced, of the pasteurization plant and the facilities of transportation (R.14).

On August 30, 1946 the City of Beloit denied appellant's application for license to sell milk in the City of Beloit on the sole ground that he had not complied with Section 8.09 (X) (2) of its ordinances, which reads:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in ap-

proved plants within six miles from the intersection of State Street and East Grand Ave. in the City of Beloit." (R.13)

Appellant brought mandamus in the Circuit Court of Rock County to compel the city to issue him a license, alleging that the above provision of the Beloit City Ordinance deprived him of his property and right to make a livelihood without due process of law and constituted an illegal interference with interstate commerce (R.2). The trial court held the above provision did not violate the Constitution of the United States and dismissed the appellant's petition for mandamus (R.7-10).

On appeal the Supreme Court of the State of Wisconsin on June 9, 1947, entered judgment affirming the decision of the lower court.

II. State Statute, the Validity of Which Is Involved

There was drawn in question in this case the validity, under Section 8 of Article 1 and the 14th Amendment of the Constitution of the United States, of Section 8.09 (X) (2) of the Beloit City Ordinances which reads:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit."

The city ordinance is a statute within the meaning of section 237(a) of the Judicial Code, for purpose of appeal to this court. *John P. King Mfg. Co.* v. *City Council of Augusta, et al.* (277 U. S. 100) (48 S. Ct. 489), 72, L. Ed. 801.

III. Dates of Judgment and Appeal

The final judgment of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court of Rock County,

Wisconsin, dismissing appellant's petition and holding the above quoted provision of the City ordinance valid was entered on June 10, 1947. *Dyer* v. *City Council of City of Beloit, et al.*, 27 N. W. 2d 733.

Petition for appeal to this court was presented to the Honorable Chester A. Fowler, Acting Chief Justice of the Supreme Court of Wisconsin on July 30, 1947 and was by him allowed the same day.

IV. Manner in Which Federal Question Was Raised

The Federal questions in this case were raised at the outset and urged throughout all the proceedings in the state courts. The action was started by filing a petition for mandamus in the Circuit Court for Rock County, Wisconsin. This petition alleged among other things that the City of Beloit denied the appellant the right to sell pasteurized milk within the City of Beloit on the sole ground that the pasteurization plant where appellant obtained his milk was not located within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit, and that the action of the city in refusing to grant the appellant a license was arbitrary and unreasonable; that the above quoted provision of the city ordinance was unconstitutional, deprived the appellant of his property and a right to make a livelihood without due process of law and constituted an illegal interference with interstate commerce (R.1-3).

In its opinion the trial court stated:

> "The petitioner brings this mandamus proceeding to compel the issuance of a license, claiming that the City of Beloit unreasonably and arbitrarily refused to grant the license and that such refusal deprived him of his property rights and of constitutional rights without due process of law, and is an illegal interference with interstate commerce" (R.8).

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The opinion of the Supreme Court of Wisconsin appended to this statement affirmatively shows that the Federal questions were presented to, considered and decided by it.

> "BARLOW, J. The city of Beloit passed an ordinance under its police power regulating the sale and distribution of whole milk for direct human consumption, and the question presented involves the constitutionality of this ordinance. The only provision attacked is sec. 8.09 (X) (2) of the general ordinance, which provides:
>
> 'No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit.'
>
> It is claimed this is a trade barrier, violates the right of contract guaranteed under the Fourteenth Amendment of the constitution of the United States, and is in conflict with the Interstate Commerce Clause of the United States Constitution, sec. 8, art. 1" (R.25).

V. Question Involved Is Substantial

This is the first time in the judicial history of this county that a state or federal court of last resort has declared that the production and sale of any wholesome food within its territorial limits may be arbitrarily restricted to that produced and processed in such surrounding territory as it deems capable of producing and processing the necessary amount to supply its population.

This doctrine is stated in the following portions of the opinion:

> "It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian v. Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, *where the court said*

that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt. (Italics ours.)

Counsel for appellant relies on *State ex rel. Larson v. City of Minneapolis*, supra, and *La Francei v. City of Santa Rosa*, 8 Cal. (2d) 331, 65 Pac. (2d) 1301. In each instance the city passed an ordinance restricting the sale of milk in their respective cities to that pasteurized in plants located within the city limits of the particular city. No consideration was given to the area necessary to furnish the milk, and the plants near the cities in question were arbitrarily prohibited from selling milk in the city. No inspection of the farms producing the milk was provided for in the ordinances, making the facts entirely different from those under consideration. Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. *The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served.* A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens. (Italics ours.)

This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers. *State v. Chicago, Milwaukee & St. Paul R.*

Co. (1908), 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326; *Wadhams Oil Co. v. Tracy* (1909), 141 Wis. 150, 123 N. W. 785."

This decision is contrary to the latest pronouncements of this Court upon the meaning and purpose of the Interstate Commerce Clause of the Constitution of the United States.

This Court stated in *Freeman* v. *Hewit*, — U. S. —, 67 S. Ct. 274, 276:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the *States, but by its own force created an area of trade free from interference by the States.* In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. Southern Pacific Co. *v.* Arizona, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915; Morgan *v.* Virginia, 328 U. S. —, 66 S. Ct. 1050. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the Morgan case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.
>
> These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable be-

cause it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense." (Italics ours.)

In *Carter* v. *Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464 at page 137 of U. S. Rep. and 468 of S. Ct. Rep.:

> "That clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution pro tonto of absolute state sovereignty over the same subject."

In *Southern Pac. Co.* v. *State of Arizona*, 325 U. S. 761, 769, 65 S. Ct. 1515, 1520, this Court stated:

> "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

In *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330, 64 S. Ct. 1023, 1026 this Court stated:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several States."

In the case at bar Beloit drew a circle around itself with a radius of six miles from the center of the City and absolutely prohibited all commerce originating beyond the rim of the circle. It is true Beloit is on the State line between Wisconsin and Illinois and part of the circle lies within the State of Illinois. But that fact, plus the fact that Congress has not passed regulatory legislation, does not save this ordinance from the Commerce Clause. *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862. In the later case a stat-

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ute prescribing a 100 mile radius within which animals should be inspected before slaughter was held invalid.

The Beloit ordinance is in violation of the due process clause of the Fourteenth Amendment. The philosophy of the opinion of both the trial and Supreme Court of Wisconsin was that the City of Beloit could make arrangement to inspect enough of the surrounding territory to supply it with milk and prohibit entry of milk originating beyond the artificial line prescribed by the ordinance.

The line was drawn without reasonable relation to the supposed object to be obtained by the city. The chief health officer of the city testified that with its present staff he would be unable to inspect the milk plant where the plaintiff proposed to obtain his milk and the additional farms from which the milk came, even though the plant and farms were located within the 6 mile zone (R. 16-17).

The trial court stated in its opinion which under the Wisconsin law is equivalent to a formal finding of fact—*Wolfrom* v. *Anderson*, 249 Wis. 433, 25 N. W. (2d) 880, as follows:

> "No objection is raised by the city as to the grade or quality of the milk sought to be sold, and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinances, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than 6 miles from the City of Beloit, i. e., a distance of between 25 and 35 miles from the point indicated from Beloit City Ordinance" (R. 8).

The Beloit City Ordinance also provided:

> "(X) (6) The Health Officer or any officially appointed representative he may so designate shall inspect periodically or at such time as convenient or which expediency may require, every dairy farm producing milk and cream for consumption within the City of Beloit and all milk plants whose milk and cream are

intended for consumption with- the City of Beloit" (R. 27).

The philosophy of the opinions of both the trial and Supreme Court of Wisconsin is that the city under the due process clause may deal with as many milk dealers as the city deems necessary to supply the local population with milk and refuse license to all others and that such an ordinance is not in violation of the due process clause if enacted in "good faith."

In *State of Minnesota* v. *Barker*, 136 U. S. 313, 34 L. Ed. 455, this Court stated:

> "The presumption that this Statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the Statute unconstitutional and void."

The Supreme Court of New Jersey—*Sheffield Farms Co., Inc.* v. *Seaman* (N. J.), 177 A. 372, held such an ordinance to be unconstitutional, stating:

> "The city just took the position that it had enough milk dealers and that it had the situation 'well in hand.' Such a position is unreasonable; it is arbitrary, capricious, and discriminatory. It unlawfully curtails prosecutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do."

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The following cases have held that an ordinance requiring the pasteurization plant to be located within the city limits is unconstitutional: *State ex rel. Larson* v. *City of Minneapolis* (Minn.), 251 N. W. 121, *LaFranchi* v. *City of Santa Rosa* (Cal.) 65 P (2d) 1301.

The following cases held city ordinances which prescribed that the pasteurization plant should be located within the boundaries of the county in which the city was located invalid as a violation of due process: *Meridian* v. *Sippy* (Cal. App.) 128 Pac. (2d) 884 at page 888 stated.

> "Any ordinance or statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes it reasonably necessary. Such is not the case here. The contention of respondent if approved might result in the erection of trade barriers that would affect the economic prosperity of the whole state."

Grant v. *Leavell*, 259 Ky. 267, 82 S. W. (2d) 283, and *Prescott* v. *City of Borger* (Tex. App.) 158 S. W. (2d) 578.

There are no decisions of any court of last resort in this country that sustained the validity of a similar ordinance.

VI. It is, therefore, respectfully submitted that this court has jurisdiction of this appeal under section 237 (a) of the Judicial Code, as amended.

The opinion of the trial court is attached hereto and marked Appendix A and the opinion of the Supreme Court of Wisconsin is also attached and marked Appendix B.

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APPENDIX A

STATE OF WISCONSIN, CIRCUIT COURT, ROCK COUNTY

LAWRENCE DYER, *Petitioner*,

v.

CITY COUNCIL of the City of BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin, *Defendants*

DECISION AND ORDER DENYING WRIT

This action arises out of the refusal of the Common Council of the City of Beloit to grant a license to the Petitioner to sell and distribute pasteurized milk within the City of Beloit.

The milk which the Petitioner proposed to sell and deliver in the City of Beloit, would be pasteurized at the Dean Milk Company plant located at Chemung, Illinois, some twenty-five to thirty-five miles distant from said City of Beloit.

Section 8.09 X (2) of the General Ordinances of the City of Beloit, provides that:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Avenue, in the City of Beloit."

The Petitioner's application for a license was filed on August 29, 1946, and was rejected at a regular Council meeting held on August 30, 1946, for the reason that the pasteurization plant of the Dean Milk Company was located more than six miles from the intersection of the two above named streets in the City of Beloit, and that proper inspec-

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tion would require unreasonable additional expense to the City of Beloit.

The Petitioner brings this mandamus proceeding to compel the issuance of the license, claiming that the City of Beloit unreasonably and arbitrarily refused to grant the license, and that such refusal deprives him of his property rights and of constitutional rights without due process of law, and is an illegal interference with interstate commerce.

No objection is raised by the City as to the Grade or quality of the milk sought to be sold, and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinance, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the City of Beloit; i.e., a distance of between twenty-five and thirty-five miles from the point indicated by the Beloit City Ordinance.

A stipulation of facts was entered into between Council respectively, and some testimony taken upon the hearing. The only issue involved is as to whether or not the six mile provision of the Beloit Ordinance constitutes an unreasonable interference with the rights of the petitioner.

It is well recognized throughout this country, and some other countries, that milk is a valuable and universal food product; that it is peculiarly liable and subject to contamination and adulteration; that the business of producing and distributing milk is one which, when improperly conducted or carelessly handled, may seriously affect the public health; that in the interest of public health and safety the regulation of the production and distribution of milk is within the police power of the sovereignty; and that strict regulatory provisions may be enacted and enforced to guarantee to the consumer that protection which the sovereignty owes to him.

It is now a universal requirement and practice that milk shall be inspected at its source of supply, in order to determine, not only its proper grade, but whether the conditions surrounding its production are sufficiently sanitary, etc. Qualified inspectors are therefore appointed or hired by municipalities to make periodical inspections.

The petitioner herein has made no offer to assume or repay the additional expense necessary to have such additional inspections made. The cases cited by petitioner's counsel, where ordinances similar to the Beloit Ordinance have been held invalid, are cases where the milk concerned was produced in a territory where inspections were already being made by regular inspectors of the particular municipality involved, and would incur no particular additional expense to the City.

Zoning ordinances are valid if reasonable and not intended as a trade barrier. They must also be reasonable and not arbitrary, capricious or discriminating. I am aware that the mere fact that a City already has a sufficient number of milk dealers, or has an adequate supply of milk, would present no valid reason for the refusal of a license to sell milk in the City, as that would then be an unfair and illegal interference with property and constitutional rights.

I am therefore of the opinion, that under all the circumstances appearing in this proceeding the Ordinance here involved was not intended as a trade barrier, and is not unreasonable, arbitrary or capricious, and is therefore constitutional and valid.

The petition for a peremptory writ requiring the City of Beloit to Issue a license to the petitioner is therefore ordered denied.

Dated December 7, 1946.

By the Court,
JESSE EARLE,
Circuit Judge.

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APPENDIX B

STATE OF WISCONSIN: IN SUPREME COURT

AUGUST TERM, 1946

No. 184

LAWRENCE DYER, Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, et al., Respondents

Appeal from a Judgment of the Circuit Court for Rock County. Jesse Earle, Circuit Judge. Affirmed

September 11, 1946, Lawrence Dyer, petitioner and appellant, filed a petition praying for a writ of mandamus directing the city council of the city of Beloit, Rock County, Wisconsin, A. D. Telfer, city manager of the city of Beloit, R. H. Calland, city clerk of the City of Beloit, and Stanley J. Goldschmidt, city sanitarian of the city of Beloit, defendants and respondents, to issue to him a license as a milk distributor in the city of Beloit. Case was tried to the court, and judgment entered December 20, 1946, dismissing the petition. Petitioner appeals. The facts will be set forth in the opinion.

BARLOW, *J.:*

The city of Beloit passed an ordinance under its police power regulating the sale and distribution of whole milk for direct human consumption, and the question presented involves the constitutionality of this ordinance. The only provision attacked is sec. 8.09 (X)(2) of the general ordinance, which provides:

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit."

It is claimed this is a trade barrier, violates the right of contract guaranteed under the Fourteenth Amendment of

the constitution of the United States, and is in conflict with the interstate commerce clause of the United States constitution, sec. 8, Art. I.

The material facts, part of which were stipulated, are that Lawrence Dyer, appellant, applied for a license to distribute milk in the city of Beloit under the ordinance, setting forth in his application for a license that he was going to obtain his milk from a pasteurizing plant of the Dean Milk Company located in Chemung, Illinois, a distance of between twenty-five and thirty miles from the point indicated by the ordinance of the city of Beloit, and truck the same to the city of Beloit. As required by the ordinance he filed with the city clerk a list of farmers who furnished milk to the Dean Milk Company plant, the total number of farms being one hundred and ninety-seven. These farms are located in four counties, three of which are in the state of Illinois and one in the state of Wisconsin. The application was denied under the ordinance. The state line between Wisconsin and Illinois is the south city limits of the city of Beloit.

That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 A.M. Jur. p. 1092, sec. 307. Municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a prima facie presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the

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purpose sought to be accomplished and the effect upon all who must comply with it.

The city of Beloit is in the center of an area producing great quantities of milk, containing a large number of pasteurization plants, condenseries and creameries. The area described in the ordinance includes pasteurization plants both in Wisconsin and in Illinois. Over four hundred farms are included in the area and slightly over one hundred farms produce sufficient milk to supply the demand of the city of Beloit. Thus three-fourths of the milk produced in the area is not required to supply the city of Beloit and is shipped elsewhere for such purposes as it may properly be used. The supply of milk in the area is ample for a large number of additional milk plants of any type that may desire to engage in the business. The ordinance clearly was not passed for the purpose of limiting the business to the plants then in operation. Milk is usually delivered to nearby plants as a matter of economy and convenience, which answers the contention that the location of the farms producing the milk is not limited by the ordinance but the location of the pasteurization plant is. The ordinance in question not only provides for the inspection of the pasteurization plants, but requires the inspection of the farms producing the milk.

It is claimed by appellant, and admitted by the city sanitarian from a few examinations made by him that the milk produced by the Dean Milk Company complied with the sediment tests, blue test, other tests and content requirements of the ordinance of the city of Beloit. This could well be true of milk purchased from a pasteurization plant a much greater distance from the city of Beloit. Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance. It is said in *State ex rel. Larson v. City of Minneapolis* (1933) 190 Minn. 138, 251 N. W. 121, with reference to the constitutionality of a milk ordinance, quoting with approval from the trial court:

> ". . . It is obvious that adequate inspection is a reasonable precaution. It is obvious that consideration of convenience, efficiency and cost of inspection are proper to be taken into account in determining the

question of reasonableness. It is also obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly, and too likely to be ineffective to be practicable. It seems to me there can be no doubt of the right of the city council to fix a reasonable limit beyond which it will not provide for inspection, and beyond which, for that reason, pasteurization plants will not be licensed. . . ."

The city of Beloit has two employees in this department, the city sanitarian and an assistant, and proof was offered that to assume the inspection of the additional plant and farms it would require the employment of another employee at a cost of $2,400 per year, and if other likewise distant plants were included it would cost much more. Convenience and efficiency are self-evident.

It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian v. Sippy,* 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, where the court said that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt.

Counsel for appellant relies on *State ex rel Larson v. City of Minneapolis,* supra, and *La Franchi v. City of Santa Rosa,* 8 Cal. (2d) 331, 65 Pac. (2d) 1301. In each instance the city passed an ordinance restricting the sale of milk in their respective cities to that pasteurized in plants located within the city limits of the particular city. No consideration was given to the area necessary to furnish the milk, and the plants near the cities in question were arbitrarily prohibited from selling milk in the city. No inspection of the farms producing the milk was provided for in the ordinances, making the facts entirely different from those under consideration. Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopt-

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ing it. The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served. A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens.

This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers. *State v. Chicago, Milwaukee & St. Paul R. Co.* (1908), 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326; *Wadhams Oil Co. v. Tracy* (1909), 141 Wis. 150, 123 N. W. 785.

It is argued that secs. 97.31-97.37, Stats. prohibit the sale of milk from unhealthy cows, insanitary farms and utensils, and the sale of insanitary and adulterated milk, and authorize the state department of agriculture to inspect the premises, plants and facilities of transportation and fix the requirements of pasteurization. The department of agriculture assumes responsibility for milk complying with the statutes used in manufacturing, this being known to the public as "Grade B Milk," but it leaves to the municipalities the regulation of milk furnished for direct human consumption, known to the public generally as "Grade A Milk," except as the department of agriculture assists the municipalities and cooperates with them in requiring dealers to sell clean, wholesome milk produced under sanitary conditions that comply with the state law and local ordinances that may be lawfully passed. This cannot be said to burden interstate commerce in any way.

It is considered that the ordinance is a reasonable exercise of the police power of the City of Beloit.

By the Court.—Judgment affirmed.